

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THE LARYNGEAL MASK COMPANY LTD. and LMA NORTH AMERICA, INC., v. AMBU A/S, AMBU INC., AMBU LTD., and AMBU SDN. BHD., Defendants.)	Civil No.07cv1988-DMS (NLS) ORDER DENYING WITHOUT PREJUDICE MOTION TO EXCLUDE EXPERT TESTIMONY OF NIKOLAUS GRAVENSTEIN, SAMSUN LAMPOTANG, MICHAEL MAZIS, RYAN SULLIVAN AND J. MICHAEL THESZ [Docket No 365]
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On October 15, 2007, Plaintiffs The Laryngeal Mask Company Ltd. and LMA North America, Inc. (collectively, “LMA”) commenced this patent infringement suit against Defendants Ambu A/S, Ambu Inc. and Ambu Ltd. (collectively, “Ambu”). [Doc. No. 1]. On August 25, 2008, Ambu filed an Amended Answer and Counterclaims, asserting counterclaims based on the allegation that LMA used a brochure that falsely asserted that Ambu’s mask can cause nerve injury. [Docket No. 72.]

On September 1, 2009, LMA filed a motion to exclude the testimony of the following Ambu expert witnesses: Nikolaus Gravenstein, Samsun Lampotang, Michael Mazis, Ryan Sullivan and J. Michael Thesz. The motion is based on the alleged spoliation of all draft expert reports. Ambu opposed the motion, arguing: 1) that no draft reports were destroyed, the working documents were simply overwritten as changes were made; 2) draft reports are not required to be produced under Rule 26; 3) draft reports are covered by the work product immunity; 4) LMA used the same process for the production of expert reports; and 5) LMA has not been prejudiced.

1 On September 25, 2009, the presiding judge granted LMA's renewed Motion for Entry of
2 Judgment and to Stay the Counterclaims pending appeal. [Docket No. 476.] On October 6, 2009, the
3 presiding judge entered Judgment on the patent claims and Ordered that the proceeding be stayed as to
4 the counterclaims. [Docket nos. 484, 485.] After the resolution of the appeal, the parties are to contact
5 the court, at which time the Court will consider lifting the stay and setting a new trial date. Because the
6 law¹ and issues involved in this motion may be substantially different if and when the new trial date is
7 set, and in the interests of judicial economy, It Is Hereby Ordered that the Motion to Exclude Expert
8 Testimony is DENIED WITHOUT PREJUDICE.

9 IT IS SO ORDERED.

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11 DATED: October 29, 2009



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13 Hon. Nita L. Stormes
14 U.S. Magistrate Judge
United States District Court

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26 ¹An Amendment to Rule 26 of the Federal Rules of Civil is pending on the topic of whether
27 draft expert reports are covered by the work product immunity. *See*
28 http://www.uscourts.gov/rules/Reports/Combined_ST_Report_Sept_2009.pdf. The split in authority on
this issue, and the pending amendment, argue strongly against exclusionary sanctions for any failure to
maintain draft expert reports.